

<sup>2</sup> The Board notes that, following the March 23, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On November 24, 2014 appellant, then a 46-year-old miscellaneous administrative and program worker, filed a traumatic injury claim (Form CA-1) alleging that on November 21, 2014 she sustained tail bone and buttock injuries when she slipped and fell on a wet surface while walking down an exit ramp in the performance of duty. She stopped work on November 24, 2014. OWCP accepted the claim for lumbar sprain, and subsequently expanded the acceptance of the claim to include lumbar spondylolysis, other lumbar spondylosis with radiculopathy, and sacroiliitis.

On May 15, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a report dated June 22, 2017, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, related that appellant had three percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity due to sensory deficit of the L5 peripheral nerve.

In a report dated September 1, 2017, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, acting as OWCP's district medical adviser (DMA) concurred with Dr. Valdez' rating of appellant's permanent impairment of the lower extremities.

The record reflects that OWCP granted appellant a schedule award on December 8, 2017 for three percent permanent impairment of the right lower extremity, and three percent permanent impairment of the left lower extremity. The period of the award ran from June 23 through October 21, 2017.

On May 22, 2019 appellant filed a Form CA-7 requesting an additional schedule award.

In a May 23, 2019 report, Dr. Eric B. Hintz, a neurosurgeon, indicated that appellant's diagnoses consisted of lumbar ligament sprain and lumbar spondylosis with radiculopathy. The date of appellant's maximum medical improvement (MMI) was listed as April 8, 2019. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009)(*The Guides Newsletter*).<sup>3</sup> Dr. Hintz assigned zero percent permanent impairment for lumbar sprain, two percent permanent impairment for left L5 spondylosis with radiculopathy, and two percent right lower extremity permanent impairment for right L5 spondylosis with radiculopathy. Using the Combined Values Chart on page 604, Dr. Hintz found four percent combined lower extremity permanent impairment for L5 spondylosis with radiculopathy left greater than right.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

OWCP referred appellant's medical record to Dr. Harris, OWCP's DMA. In a report dated June 10, 2019, Dr. Harris concluded that appellant had zero percent right lower extremity permanent impairment and two percent left lower extremity permanent impairment.

On July 5, 2019 Dr. Glass reviewed and concurred with the DMA's June 10, 2019 impairment rating. On September 19, 2019 OWCP received an undated acknowledgement from Dr. Hintz noting that he had reviewed and concurred with the DMA's June 10, 2019 impairment rating.

On July 29, 2020 OWCP referred appellant to Dr. Charles W. Kennedy Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's entitlement to an additional schedule award. In a report dated August 24, 2020, Dr. Kennedy related that, pursuant to *The Guides Newsletter*, appellant had zero percent permanent impairment of the lower extremities as she had no motor or sensory deficits from her accepted lumbar conditions.

On October 9, 2020 OWCP referred appellant's medical record to the DMA, Dr. Harris, for review of the medical evidence regarding appellant's additional schedule award claim. In a report dated October 14, 2020, Dr. Harris noted that appellant underwent posterior lumbar interbody L5-S1 fusion on November 19, 2019. The DMA noted that Dr. Kennedy, in his August 24, 2020 evaluation, observed no lower extremity neurologic deficits consistent with lumbar radiculopathy. Using Table 16-11 on page 33 of the A.M.A., *Guides*, and Table 2 in *The Guides Newsletter*, to calculate appellant's permanent impairment, he found zero percent permanent impairment due to the lack of neurologic deficits in the lower extremities consistent with lumbar radiculopathy. The DMA further noted that the range of motion methodology was not applicable and indicated that appellant had reached MMI on November 24, 2020. Dr. Harris concurred with Dr. Kennedy's assessment of no lower extremity deficits consistent with lumbar radiculopathy, resulting in a zero percent permanent impairment rating.

By decision dated October 27, 2020, OWCP denied appellant's increased schedule award claim, finding that appellant had zero percent bilateral lower extremity permanent impairment with an August 24, 2020 date of (MMI).

On February 9, 2021 appellant requested reconsideration. OWCP subsequently received a January 9, 2020 lumbar x-ray and March 19, 2020 computerized tomography (CT) scan.

In reports dated January 9, February 10, and September 14, 2020, Dr. Hintz summarized examination findings and diagnosed lumbosacral spondylolisthesis. On examination he reported a lumbosacral incision, healing well, and intact sensation to light touch from the knee to foot bilaterally. In his September 14, 2020 report, Dr. Hintz related slightly reduced pinprick sensation relative to contralateral in the skin overlying her right medial shin and medial malleolus.

In a September 17, 2020 report, Dr. John Patrick McCallin, a Board-certified physiatrist, diagnosed sacroiliitis, chronic post-procedural pain, lumbosacral radiculopathy, and sacroccygeal disorders.

On October 14, 2020 Dr. Hintz requested an electromyogram/nerve conduction velocity (EMG/NCV) study for a provisional diagnosis of L5 radiculopathy.

By decision dated March 23, 2021, OWCP denied appellant's request for reconsideration.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>4</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>8</sup>

## **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In her February 9, 2021 request for reconsideration, appellant did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>9</sup>

The underlying issue in this case is whether appellant has lower extremity sensory or motor deficit, due to her accepted lumbar conditions, which is ratable under *The Guides Newsletter*. In

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<sup>4</sup> 5 U.S.C. § 8128(a); *see A.M.*, Docket No. 20-1417 (issued July 30, 2021); *J.D.*, Docket No. 19-1757 (issued April 15, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see A.M., id.; J.D., id.; L.D., id.; see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4(b).

<sup>7</sup> *Id.* at § 10.608(a); *see also A.M., supra* note 4; *M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *See D.C.*, Docket No. 20-0916 (issued September 14, 2021); *C.S.*, Docket No. 19-0851 (issued November 18, 2019); *J.B.*, Docket No. 17-0628 (issued June 28, 2017).

support of her reconsideration request, appellant submitted a January 9, 2020 lumbar x-ray, March 19, 2020 CT scan, and medical reports dated January 9, February 10, September 14, and October 14, 2020 from Dr. Hintz, and a September 17, 2020 report by Dr. McCallin. Dr. Hintz, in his January 9, February 10, September 14 and October 14, 2020 reports, did not relate examination findings of any lower extremity deficits due to motor weakness or sensory loss, which he indicated would be ratable under *The Guides Newsletter*. In his September 14, 2020 report, Dr. Hintz related slightly reduced pinprick sensation relative to contralateral in the skin overlying her right medial shin and medial malleolus. He did not, however, indicate that this reduced sensation was caused by the accepted conditions, and was ratable under *The Guides Newsletter*. In his September 17, 2020 report, Dr. McCallin provided no physical examination findings. The new evidence submitted is not relevant and pertinent to the underlying issue of appellant's claim, as it does not contain new evidence addressing the current extent of her employment-related permanent impairment.<sup>10</sup> Thus, appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>10</sup> *D.C., id*; see *L.S.*, Docket No. 19-0592 (issued September 6, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board